

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
on its own motion)	
)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a NICOR)	
Gas Company)	
)	
Reconciliation of Revenues collected under)	
Gas Adjustment Charges with Actual Costs)	
prudently incurred)	
)	
Illinois Commerce Commission)	
on its own motion)	
)	Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR)	
Gas Company)	
)	
Proceeding to review Rider 4, Gas Cost, pursuant)	
to Section 9-244(c) of the Public Utilities Act)	
)	
Illinois Commerce Commission)	
on its own motion)	
)	Docket No. 02-0725
Northern Illinois Gas Company d/b/a NICOR)	
Gas Company)	
)	
Reconciliation of Revenues collected under)	
Gas Adjustment Charges with Actual Costs)	
prudently incurred)	

**VERIFIED MOTION TO COMPEL DISCOVERY
FROM CITIZENS UTILITY BOARD
AND THE COOK COUNTY STATE'S ATTORNEY'S OFFICE**

Northern Illinois Gas Company d/b/a Nicor Gas Company ("Nicor Gas" or the "Company"), through its undersigned attorneys, hereby respectfully moves the Administrative Law Judges (the "ALJs") pursuant to Section 200.370 of the Commission's Rules of Practice, 83 Ill. Admin. Code § 200.370, for a ruling compelling Citizens Utility Board ("CUB") and the Cook County State's Attorney's Office ("Cook County") (collectively, "CUB/Cook County") to produce relevant documents authored by their testifying witness in this proceeding, Jerome D.

Mierzwa, which CUB/Cook County have withheld from production on the unsupported basis that the documents are privileged.

In discovery in this matter, Nicor Gas has sought Mr. Mierzwa's reports and workpapers, including drafts of such documents, created or reviewed in connection with the testimony he will be offering. In response, Cook County has identified four (4) reports written by Mr. Mierzwa relating to the subject matter of this proceeding, which it has declined to produce on the basis that these reports are protected from disclosure under the attorney work product doctrine. CUB has asserted that various unidentified materials created by Mr. Mierzwa in connection with his role as a testifying witness are protected from disclosure based upon the work product doctrine *and* the attorney-client privilege. CUB has declined to identify with specificity or to provide a privilege log for Mr. Mierzwa's documents withheld from production.

In discussions with Nicor Gas counsel, counsel for CUB/Cook County have provided no authority in support of their decision to withhold Mr. Mierzwa's documents. Indeed, this position is contrary to case law that CUB/Cook County repeatedly have cited before the ALJs in seeking discovery from Nicor Gas. (*See discussion infra*). The law is unequivocal that neither the work product doctrine nor the attorney-client privilege functions to allow a party for its own strategic purposes to withhold from disclosure selected materials created or reviewed by its testifying witness. The law rejects this artifice because such a practice, if allowed, would undermine irrevocably the credibility of the truth-seeking process. In short, a testifying expert's relevant documents—including communications between a testifying witness and counsel for the party sponsoring that witness—are not privileged, and Mr. Mierzwa's reports and workpapers are subject to discovery and should be produced without further delay.

Given the material prejudice to Nicor Gas caused by CUB/Cook County's improper and unsupported refusal to produce or, in CUB's case, even to identify Mr. Mierzwa's relevant documents, and the limited time available to the Company in which to prepare its rebuttal case, which is scheduled to be served on the parties on January 16, 2004, Nicor Gas seeks expedited resolution of this Motion.

In further support of this Motion, Nicor Gas states as follows:

1. On December 5, 2003, Cook County responded to the Company's Second Set of Data Requests to Cook County. Cook County supplemented its response on December 17, 2003. In response to data request NG-CCSAO 2.02, Cook County identified four (4) "reports" prepared by Mr. Mierzwa, which Cook County asserted are protected from disclosure under the work product doctrine. Cook County described these documents, as follows:

1. Memo summarizing the Lassar Report 11/1/02
2. Memo entitled "identification (sic) of Issues" 9/24/02
3. Memo summarizing Nicor's Direct on Reopening 8/13/03
4. Memo entitled "Deposition Material" 6/19/03¹

Nicor Gas understands that the "Lassar Report," as referenced in Cook County's response, refers to the October 28, 2002 Report to the Special Committee of the Board of Directors of Nicor Inc. by independent Counsel Scott R. Lassar. Nicor Gas understands that "Deposition Material," as referenced in Cook County's response, refers to the depositions of certain Nicor Gas employees, which took place in June and July 2003.

2. On December 5, 2003, CUB responded to the Company's First Set of Data Requests on CUB. This discovery sought, *inter alia*, CUB's documents related to specific transactions and issues referenced in the Lassar Report. In response to NG-CUB 1.04, 1.07,

¹ Cook County's supplemental response to NG-CCSAO 2.02 and transmittal correspondence are attached to this Motion as Exhibit 1.

1.10, 1.13, 1.16, 1.19, 1.22, 1.25, and 1.28, CUB asserted that certain unidentified responsive documents produced by Mr. Mierzwa are protected from disclosure under the work product doctrine and the attorney-client privilege. Specifically, CUB objected to the discovery, as follows:

Jerry Mierzwa ... produced some summaries and analysis regarding the Lassar Report, and the issues discussed in the report, that are product (sic) by the attorney-client privilege and work product doctrines (sic).²

Nicor Gas notes that, under the ALJs' October 29, 2003 ruling (*see* Tr., pp. 454-55, Oct. 29, 2003), objections to the Company's First Set of Data Requests were due on November 26, 2003. Accordingly, CUB's objection and refusal to respond to this discovery on the basis of privilege not only was improper but untimely, as well.

3. Nicor Gas counsel has spoken and/or corresponded with Cook County and CUB counsel on several occasions with respect to the relevant materials created by Mr. Mierzwa that have been withheld from production. Nicor Gas counsel has requested production of the specific materials identified by Cook County (*see* ¶ 1 *supra*; Ex. 1) and has requested that CUB either produce or, at a minimum, specifically identify the materials referenced in its discovery response (*see* ¶ 2 *supra*; Ex. 2). In these communications, Nicor Gas counsel has noted, *inter alia*, that CUB/Cook County's decision to withhold relevant materials created by their testifying expert is unsupported by law and, indeed, contrary to case law that these parties have cited before the ALJs in this proceeding. As of the filing of this Motion, Nicor Gas has not received the requested documents, despite consultation and reasonable attempts to resolve its differences with CUB/Cook County. *See* 83 Ill. Admin. Code § 200.350.

² The pertinent portions of CUB's Responses to the First Set of Data Requests on CUB and transmittal correspondence are attached to this Motion as Exhibit 2.

4. For purposes of analysis, Nicor Gas begins with the Commission's stated policy that discovery should provide "full disclosure of all relevant and material facts to a proceeding." 83 Ill. Admin. Code § 200.340. The materials created by CUB/Cook County's testifying expert, Mr. Mierzwa, based upon the descriptions provided by these parties, are relevant to the issues in this proceeding and, thus, are discoverable. *See Bauter v. Reding*, 68 Ill. App. 3d 171, 175, 385 N.E.2d 886, 890 (3d Dist. 1979) (upholding contempt order against defendant insurance carrier for its refusal to produce its entire claim file related to the litigation); *accord Pemberton v. Tieman*, 117 Ill. App. 3d 502, 505, 453 N.E.2d 802, 804 (1st Dist. 1983).

5. CUB/Cook County have not objected to the discovery at issue on the basis of relevance. Rather, they summarily have asserted, without any factual or legal support, that the matters contained in Mr. Mierzwa's withheld documents are privileged. (*See* Exs. 1 and 2). It is hornbook law that a party which claims to be exempt from discovery on the basis of privilege has the burden of demonstrating the facts giving rise to the privilege. *Krupp v. Chicago Transit Auth.*, 8 Ill. 2d 37, 42, 132 N.E.2d 532, 536 (1956). CUB/Cook County's mere assertions of privilege are wholly inadequate. *Id.* On this basis alone, the Motion should be granted, and these parties required to comply without further delay with the discovery in question.

6. With respect to the privileges claimed, only CUB has asserted that Mr. Mierzwa's relevant documents are protected by the attorney-client privilege. (*See* Ex. 2). This bald assertion is unsupported by law and could not be supported by a good-faith argument for extension, modification, or reversal of established authority. The purpose of the attorney-client privilege is to encourage and promote full and frank consultation between a client and its legal counsel. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 117-18, 432 N.E.2d 250, 256 (1982). Mr. Mierzwa is not an attorney nor is he counsel to CUB in this proceeding. Thus, the essential predicate of the privilege does not exist. Furthermore, even if Mr. Mierzwa were an

attorney and represented CUB, any privilege between Mr. Mierzwa and CUB would have been waived in its entirety based upon CUB's identification of Mr. Mierzwa as a testifying witness in this proceeding. *People v. Wagener*, 196 Ill. 2d 269, 273-78, 752 N.E.2d 430, 434-37 (2001) (attorney-client privilege waived as to matters disclosed to testifying expert). Nicor Gas notes that CUB previously relied upon *Wagener* in briefing before the ALJs for this proposition, and it should not be allowed to take a contrary position at this juncture.³

7. Both Cook County and CUB assert—without support—that Mr. Mierzwa's relevant documents are protected from disclosure by the attorney work product doctrine. As adopted by the Illinois courts, and as codified by the General Assembly, the work product doctrine provides a qualified protection against disclosure for materials containing a party's attorney's theories, mental impressions, and litigation plans. *Consolidation Coal Co.*, 89 Ill. 2d at 108-11, 452 N.E.2d at 252-53; *see* Ill. Sup. Ct. R. 201(b)(2). Merely factual or technical matters do not fall within the ambit of the doctrine. *Consolidation Coal Co.*, 89 Ill. 2d at 108-11, 452 N.E.2d at 252-53; *see also Akers v. Atchison, Topeka and Santa Fe Ry. Co.*, 187 Ill. App. 3d 950, 957, 543 N.E.2d 939, 944 (1st Dist. 1989). While Illinois also recognizes a qualified protection against disclosure for the opinions and work product of consultants—*i.e.*, persons who have been retained or specially employed in anticipation of trial but who will not be called at trial—Mr. Mierzwa is not such a person. *See* Ill. Sup. Ct. R. 201(b)(3). Thus, the only question remaining is whether Mr. Mierzwa's relevant documents, which have been withheld from production, contain CUB's and Cook County's attorneys' theories, mental impressions, and

³ *See* CUB and Cook County Reply to Nicor [Gas]'s Response to CCSAO/CUB's Motion to Compel Nicor [Gas] to Respond to CUB's 11th Set of Data Requests, p. 4, Aug. 12, 2003. For the ALJs' convenience, CUB/Cook County's reply brief has been attached this Motion as Exhibit 3. *See also* CUB and Cook County Motion to Compel Nicor [Gas] to Respond to CUB's 11th Set of Data Requests, p. 10, July 21, 2003

litigation plans and, if so, whether these parties can employ the attorney work-product doctrine as a shield against disclosure of these materials.

8. This question has been considered extensively by the courts and the weight of authority leaves no question that CUB and Cook County cannot bend the attorney work product doctrine to such a purpose. *See Barna v. United States*, No. 95 C 6552, 1997 WL 417847 (N.D. Ill. July 23, 1997) (requiring disclosure of documents from meeting between counsel and its witnesses); *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633 (N.D. Ind. 1996) (requiring disclosure of case chronology and deposition summaries, even where testifying witness did not actually rely upon materials); *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D 384 (N.D. Cal. 1991) (requiring disclosure of all communications between counsel and testifying witness related to subject matter of witness's testimony); *see also Natta v. Zletz*, 418 F.2d 633, 635 (7th Cir. 1969) (party cannot avail itself of both witness's testimony and "secret" advice).

9. Indeed, in *Karn*, which CUB/Cook County previously cited before the ALJs, the District Court adopted a "bright-line" test for the disclosure of all relevant materials considered by a party's testifying witness, even if such materials constitute opinion work product.⁴ 168 F.R.D. at 639-41. The *Karn* court identified several compelling policy interests in support of a bright-line standard as essential to the integrity of the truth-seeking process:

- *First*, an adverse party must have access to all information that shaped or potentially influenced a testifying witness's opinions in order to prepare and provide full and effective cross examination. Critically, without pre-trial access to all attorney-witness communications, opposing counsel may not be able to reveal any influence that counsel has achieved over the witness's testimony.

⁴ While the District Court's opinion in *Karn* specifically addressed Fed. R. Civ. R. 26, which is analogous to Ill. Sup. Ct. R. 201, its reasoning is applicable and persuasive with respect to the issue presented for resolution here. In this respect, Nicor Gas notes that CUB/Cook County previously cited *Karn* in support of their argument for the disclosure of work product disclosed to Nicor Gas's testifying witness, Mr. Lassar. *See* Ex. 3, CUB and Cook County Reply to Nicor [Gas]'s Response to CCSAO/CUB's Motion to Compel Nicor [Gas] to Respond to CUB's 11th Set of Data Requests, p. 4, Aug. 12, 2003. *See also* CUB and Cook County Motion to Compel Nicor [Gas] to Respond to CUB's 11th Set of Data Requests, p. 10, July 21, 2003

- *Second*, access to materials or information disclosed to a testifying witness in no way compromises the protections of the work product doctrine, which intended to allow counsel the privacy and latitude to develop new theories or pursue particular avenues of investigation. Counsel's sharing of work product with a witness does not advance the goals of the doctrine but merely informs or influences the witness.
- *Third*, a bright-line test preserves the protections of the work product doctrine by leaving no uncertainty that a testifying witness's documents will be disclosed in their entirety.

168 F.R.D. at 639-41; *accord Barna*, 1997 WL 417847, at *2-3; *Intermedics, Inc.*, 139 F.R.D at 387-97.

10. Nicor Gas notes that in discussions with respect to Mr. Mierzwa's documents, CUB counsel has asserted that CUB specifically sought Mr. Mierzwa's advice on its litigation strategy, which is reflected in the documents that have been withheld from production. CUB counsel further asserted that he was unaware of a requirement for the disclosure of a testifying witness's relevant documents and that disclosure of Mr. Mierzwa's documents would be harmful to CUB. In response, Nicor Gas observes that the actual harm presented to the truth-seeking process by CUB's improper withholding of Mr. Mierzwa's documents is of far greater concern than any purported inconvenience to CUB by the requirement to respond to discovery in a lawful manner. Nicor Gas also is perplexed by CUB counsel's apparent lack of knowledge concerning the requirement for a party to disclose its testifying witness's documents, since CUB previously cited and relied upon *Karn* in briefing for such a purpose. (*See, e.g.*, Ex. 3). Nicor Gas further notes that Mr. Mierzwa presented testimony for CUB and Cook County in the earlier phase of this proceeding and was at all times subject to such a requirement. Lastly, the courts have observed that "it would be foolish for the retaining party to use a testifying expert [to advise on strategy], as the communications would be an open book available for the opponent to review." *Chamberlain Group, Inc. v. Interlogix, Inc.*, No. 01 C 6157, 2002 WL 653893, at *4 (N.D. Ill.

Apr. 19, 2002) (*quoting Commonwealth Ins. Co v. Stone Container Corp.*, 178 F. Supp. 2d 938, 945 (N.D. Ill. 2001)). To the extent CUB used its testifying witness to advise on litigation strategy, Mr. Mierzwa's documents must be produced, regardless of CUB counsel's knowledge of the applicable law.

WHEREFORE, for all these reasons, Nicor Gas respectfully requests a ruling requiring CUB and Cook County to produce immediately the four (4) documents identified in Cook County's response to the Company's Second Set of Data Requests and any other relevant documents written or reviewed by their testifying witness, Mr. Mierzwa, which have been withheld from production. To the extent CUB and Cook County reasonably believe that any of these other documents are subject to a lawful protection against disclosure, Nicor Gas respectfully requests a ruling that these parties provide a privilege log for such materials without delay. Finally, Nicor Gas seeks expedited resolution of this Motion. Because the issues raised are limited and the legal authority is clear, Nicor Gas is not requesting a hearing on this Motion, which the Company submits may be resolved on the briefs filed.

Dated: January 5, 2003

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY
D/B/A NICOR GAS COMPANY

By: _____
One of its attorneys

John E. Rooney
Thomas A. Andreoli
Sonnenschein Nath & Rosenthal LLP
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-8000
jrooney@sonnenschein.com
tandreoli@sonnenschein.com

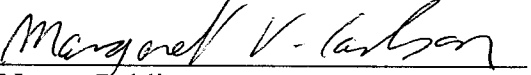
VERIFICATION

I, Thomas A. Andreoli, being first duly sworn, depose and state that I am an attorney at Sonnenschein Nath & Rosenthal LLP and one of the attorneys for Northern Illinois Gas Company d/b/a Nicor Gas Company in Consol. Docket Nos. 01-0705, 02-0067, 02-0725, that I have read Nicor Gas's Verified Motion to Compel Discovery from Citizens Utility Board and the Cook County State's Attorney's Office and know the contents thereof, and that the statements contained therein are true and correct to the best of my knowledge, information, and belief.

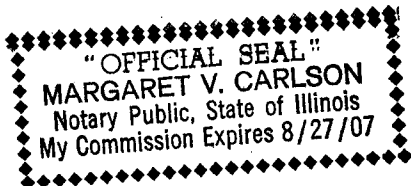


Thomas A. Andreoli

Subscribed and sworn to before me
this 5th day of January 2004



Notary Public



CERTIFICATE OF SERVICE

I, Thomas A. Andreoli, hereby certify that I served a copy of Northern Illinois Gas Company d/b/a Nicor Gas Company's Verified Motion to Compel Discovery from Citizens Utility Board and the Cook County State's Attorney's Office upon the service list in consolidated Docket Nos. 01-0705/02-0067/02-0725 by email on January 5, 2004.

Thomas A. Andreoli